U.S. DEPARTMENT OF AGRICULTURE, FOREST SERVICE
(JOHNNY P. WILSON)

IBLA 98-178 Decided May 1, 2000

Appeal from a decision of the Alaska State Office, Bureau of Land Management, approving Native allotment application J-010969.

Affirmed.

1. Alaska: Native Allotments--Evidence: Preponderance

Qualifying substantial actual possession and use of land prior to its inclusion in a national forest was established by a preponderance of recorded evidence which included a Native allotment application corroborated by other proof of use and occupancy beginning in 1901.

APPEARANCES: Maria C. Lisowski, Esq., Office of the General Counsel, U.S. Department of Agriculture, Juneau, Alaska, for the U.S. Forest Service; Carlene Faithful, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

The U.S. Department of Agriculture, Forest Service (Forest Service), has appealed a January 22, 1998, decision issued by the Alaska State Office, Bureau of Land Management (BLM), approving Alaska Native Allotment Application J-010969.

Johnny P. Wilson filed the original Alaska Native allotment application with the Juneau Land Office, BLM, on January 16, 1958, pursuant to the Act of May 17, 1906, as amended, 43 U.S.C. '' 270-1 through 270-3 (1970). His application described the land he sought as "the Unnamed island located in Little Pybus Bay in Pybus Bay in Frederick Sound." The island was later identified by BLM as Lot 2, sec. 28, T. 53 S., R. 71 E., Copper River Meridian, Alaska. A second application form was filed on December 2, 1959, amending the prior application by providing the above land description depicting 34.96 acres. This second form was accompanied by an "Evidence of Occupancy" form stating, "I continued to reside on this land on a year around basis from 1901 until 1951. I have also resided on this land from February 1 to March 1 and from November 1 to December 1 of each year from 1952 to the present time." The stated land use is as follows:

"During the hunting season I kill deer for food and during the trapping season I catch mink and land otter for their fur to provide a portion of my livelihood." He claims to have built a one-room frame cabin on the site in 1949.

The land covered by his application was withdrawn and reserved for the Tongass National Forest on February 16, 1909. By letter dated January 11, 1961, the Forest Service informed BLM that it had conducted a field examination of this island and recommended that Wilson's application be denied. The Forest Service reported that its examiner found neither evidence of any recent occupancy nor evidence of substantial use and occupancy by the applicant prior to the establishment of this portion of the Tongass National Forest. The Forest Service examiner did find the remnants of an uninhabited cabin.

On January 27, 1961, the Juneau Land Office, BLM, rejected Wilson's application, finding that "there is no evidence of occupancy prior to establishment of the Tongass National Forest and the lands are not considered valuable for agriculture and grazing purposes." 1/ On September 5, 1980, Wilson's application was reinstated. See, e.g., Heirs of George Titus, 124 IBLA 1 (1992); Heirs of Saul Sockpealuk, 115 IBLA 317, 326 (1990) (applications may not be rejected without an opportunity for a hearing, Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976), and those that had been were reinstated). The Alaska National Interest Lands Conservation Act required adjudication of the reinstated application on its merits because the land claimed was reserved for National Forest use before December 13, 1968. See 43 U.S.C. ' 1634(a)(4) (1994); Heirs of George Titus, supra.

On July 15, 1997, BLM conducted a field examination and found the resources needed to support Wilson's claimed uses were present on the island. In its January 22, 1998, decision approving the allotment application, BLM concluded: "There is no evidence in the case file that disputes the applicant's claimed use and occupancy of the lands claimed. It seems more likely than not that the applicant has used and occupied the land claimed as stated on his application." The Forest Service appealed. 2/

1/ Inclusion of land within a National Forest does not preclude the grant of a patent "if founded on occupancy of the land prior to the establishment of the particular forest or if the Secretary of Agriculture certifies that the land in an application for an allotment is chiefly valuable for agricultural or grazing purposes." 43 U.S.C. ' 270-2 (1970); see Forest Service, U.S. Department of Agriculture (Heirs of Frank Kitka), 133 IBLA 219, 222 (1995); Yakutat & Southern Railway v. Harry, 48 L.D. 362, 364 (1921).

2/ BLM's field report indicates that the applicant is deceased. The decision was served on the Central Council of the Tlingit and Haida Indian Tribes of Alaska as the recognized representative of Wilson's heirs. Neither the Central Council nor Wilson's heirs have appeared as adverse parties responding to the Forest Service's appeal.

In its statement of reasons, the Forest Service argues that the evidence of record does not affirmatively show Wilson complied with the requirements of the Native Allotment Act and implementing regulations. The Forest Service avers that the decision incorrectly relies on the observation in the 1958 field examination that a cabin had existed on the allotment. This cabin does not, the Forest Service alleges, prove that the applicant occupied the land prior to the 1909 withdrawal because the cabin was not built until 1949. The Forest Service then contends that the BLM decision gave significant weight to a statement submitted by Raymond Bell regarding Wilson's claimed use, but did not consider that Bell's statement was submitted in 1958, more than a year before Wilson amended his application. The Forest Service asserts that Bell's statement should not be relied upon to substantiate the amended application.

[1] The Department has consistently ruled that an applicant under the 1906 Native Allotment Act must affirmatively show that he or she has met the requirements of the Act and its implementing regulations in order to establish entitlement. United States v. Heirs of Jake Yaquam, 139 IBLA 376, 383-84 (1997); United States v. Galbraith, 134 IBLA 75, 100-101 (1995), and cases there cited. The standard of proof required to be applied is, as BLM found, proof by a preponderance of the evidence of record. See, e.g., Forest Service, U.S. Department of Agriculture (Paul Edwards), 144 IBLA 217, 219 (1998); Pedro Bay Corp., 111 IBLA 271, 273 (1989). The Forest Service argument that there is no proof of entry prior to 1909 overlooks the fact that Wilson's application establishes his date of entry. This direct evidence is supported by additional evidence gathered by BLM, and there is nothing to suggest that Wilson's use did not begin in 1901, as Wilson said it did. The Forest Service has not shown error in the decision now under review and we conclude that Wilson's allotment application was properly approved.

The Forest Service suggests that a contest hearing be ordered. The Board has established that when conflicting evidence exists concerning a Native allotment applicant's use and occupancy of the land claimed which raises material factual issues, a contest should be initiated so that those issues can be resolved at a hearing. See, e.g., Pedro Bay Corp., 88 IBLA 349, 354-55 (1985); State of Alaska, 85 IBLA 196, 202-204 (1985). BLM may not arbitrarily deny an allotment to an Alaska Native who meets the statutory requirements. Pence v. Kleppe, supra at 142. Similarly, a decision to approve an allotment must be supported by an analysis of the facts sufficient to support its adjudication. We find neither conflicting evidence nor failure by BLM to provide a reasoned analysis of the evidence submitted. The Board's determination in United States v. Heirs of Jake Yaquam, supra at 382-84, is instructive. In that case we determined that use of the land which does not leave physical evidence is sufficient to establish entitlement to an Alaska Native allotment, provided the record demonstrates substantiality and exclusivity of use by a preponderance of the evidence. The requirement of substantial use may be satisfied when a witness for the applicant attests to the applicant's regular use of the land in question. In the absence of contrary reliable evidence, a showing that the applicant

had affirmatively declared the area as his allotment is sufficient to preponderate on the issue of exclusivity. The record contains sufficient evidence of exclusive use and occupancy. In the absence of evidence to the contrary, this evidence preponderates on the material issues of Wilson's allotment application raised by the Forest Service, regardless of how meager the Forest Service may find it to be.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. ' 4.1, the decision is affirmed.

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R.W. Mullen
Administrative Judge

I concur:

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James L. Byrnes
Chief Administrative Judge